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The Supreme Court of the United States

OCTOBER TERM, 1949.

No. 86—MISCELLANEOUS.

ANDREW LEONARD JOHNSON, etc.,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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September 16, 1949.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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OCTOBER TERM, 1949

No. 86 Miscellaneous

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Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition should be denied because:

1. The judgment attacked is that of the Supreme Court of Florida. The judgment is not final. Certiorari lies only to a final judgment of a state court; and this Court will not review a judgment "rendered by the highest court of a state in which a decision might be had" unless the judgment is final (28 U. S. C. A. 1257).

2. This is not an appropriate case for certiorari.

3. The question of pleading involved is purely one of the state practice.

4. The petitioner has no case anyway.

1. The Judgment Attacked Is Not Final.

The opinion and judgment (R. 278) is that "this case should be, and it is hereby, reversed for a new trial upon repleader consonant with the views expressed herein".

There is nothing of finality about such a judgment; and this Court has said so repeatedly, early and late. *Houston* v. *Moore* (1818), 16 U. S. (3 Wheat.) 433, 4 L. Ed. 428; *Winn's Heirs* v. *Jackson* (1827), 25 U. S. (12 Wheat.) 135, 6 L. Ed. 577; *Rankin* v. *Tennessee* (1871), 78 U. S. (11 Wall.) 380, 20 L. Ed. 175; *Drake* v. *Kochersperger* (1898), 170 U. S. 303, 42 L. Ed. 1046; *Chesapeake & O. Ry. Co.* v. *McCabe* (1909), 213 U. S. 207, 53 L. Ed. 765, holding that of three judgments rendered by the Court of Appeals of Kentucky, the only one reviewable by this Court was a judgment of affirmance rendered on the third appeal; *Missouri & K. I. Ry. Co.* v. *Olathe* (1911), 222 U. S. 185, 56 L. Ed. 155; *Coe* v. *Armour F. Works* (1915), 237 U. S. 413, 59 L. Ed. 1027 holding that there is no final judgment reviewable by this Court until a judgment of the trial court once reversed by the State Supreme Court for further proceedings at last has been affirmed by that court on final writ of error; *Market St. Ry. Co.* v. *RR. Commission of Calif.* (1945), 324 U. S. 548, 89 L. Ed. 1171, citing Jud. Code §237, 28 U. S. C. A. 344; the judgment "must be the final word of a final court".

Indeed under the 25th section of the Judiciary Act, now Ch. 646, Public Law 773, 28 U. S. C. A. 1257, this Court says, in many of the cases just cited, that it has no jurisdiction to review a judgment from the highest court of a state unless the final word of the state court has been said on the subject of the suit involved. It was so stated in *Market St. Ry. Co.* v. *RR. Commission of California, supra,* 324 U. S. 548, 551, 89 L. Ed. 1171.

Clearly it is supererogatory to go further. We do so only because the case is now in this great Court; and we do not wish opportunity to be left to have it rejoined by petitioner that our oppositions are all "purely technical".

2. The Case Is Not an Appropriate One For Certiorari.

The only grounds of the petition (unnumbered pp. 2, 5) which might be thought to be at all tenable are:

> (1) ". . . whether the Supreme Court of Florida has decided a Federal question of *substance* not heretofore determined by this Court and decided it in a way probably not in accord with the applicable decisions of this Court" ("substance" is italicized because the point ruled by the Florida Supreme Court is not one of substantive, but of adjective law); and
>
> (2) That the Florida judgment "is not in accord with the applicable decisions of this Court and is in direct conflict with the decisions of the Federal Court".

The holding of the Florida Supreme Court does not decide any "Federal question of substance". It decides instead a question of proper pleading under the Florida practice. No "applicable decisions of this Court" are cited and we know of none, which hold that a decision by a state court of a point of pleading under the state law and remitting the case to the trial court for further proceedings, decides a matter of substance. Nor do we know any statement by this Court which suggests such a principle. If the merits of the controversy are drawn into question here at all, they concern nothing more than the particular facts of this case; and we do know that as recently as January 31, 1949 two Justices of this Court said, as one of them

often before had said, that any case—even though it be one arising under the Federal Employers Liability Act, which class of cases "becomes a growing portion" of this Court's business—which involves nothing more than the facts of that particular case, is not worthy of certiorari. *Wilkerson* v. *McCarthy*, 336 U. S. 53.

3. The Petition Presents Purely a Question of Florida Pleading.

The petitioner deliberately chose between the alternative forums offered him by 45 U. S. C. A. 56, and filed his action in the state court. Thereby he became amenable to the state method of pleading and practice. That was true formerly under the Conformity Act, and it is true now. *Slocum* v. *Erie R. Co.* (D. C. N. Y. 1929) 36 Fed. (2d) 277 (under the Conformity Act); *Ecclesine* v. *Great Northern Ry. Co.* (Mont. 1920) 194 Pac. 143; *King* v. *Schumacher* (Calif. 1939) 89 Pac. (2d) 466; cert. den. 308 U. S. 593, 84 L. Ed. 496; *Dewing* v. *N. Y. C. R. Co.* (Mass. 1933) 183 N. E. 754; *Louisville, etc. R. Co.* v. *Stewart's Adm'x.* (Ky. 1913) 161 S. W. 557; modified on other grounds 163 S. W. 755; affirmed 241 U. S. 261, 60 L. Ed. 989; *Renn.* v. *Seaboard A. L. Ry. Co.* (N. C. 1915) 86 S. E. 964; affirmed 241 U. S. 290, 60 L. Ed. 1006; *Howell* v. *Atlantic C. L. R. Co.* (S. C. 1914) 83 S. E. 639; *Avance* v. *Thompson* (Ill. App. 1943) 51 N. E. (2d) 334; reversed on other grounds 55 N. E. (2d) 57.

The last word on this subject was by this Court (1949) in *Reynolds* v. *Atlantic C. L. R. Co.*, 336 U. S. 207, 93 L. Ed. *475. That petitioner, as permitted by the state practice in Alabama (from whose Supreme Court the case came here) stated in her complaint all the facts she expected to prove

"so that any objections to a verdict in her favor based on evidence of those facts could be disposed of prior to trial".

"The Alabama Supreme Court conceded that the complaint adequately charged negligence. . . . It held, however, that the facts alleged did not show that the accident resulted proximately, in whole or in part, from that negligence. We can not say that the Supreme Court of Alabama erred".

Over and over, while the Conformity Act prevailed, this Court itself had held that since the statute now appearing as 45 U. S. C. A. 56 had conferred on State Courts a jurisdiction concurrent with that of the Federal Courts in acts arising under the Federal Employers Liability Act, without having made any regulation of the practice in those actions, the practice in such an action in a state court is regulated by the law of the forum. *Chesapeake etc. Ry. Co.* v. *De Atley*, 241 U. S. 310, 60 L. Ed. 1016; *Kansas City S. R. Co.* v. *Leslie*, 238 U. S. 599, 59 L. Ed. 1478; *Brinkmeier* v. *Mo. Pac. R. Co.*, 224 U. S. 268, 56 L. Ed. 758.

In states like Florida, where the common law system of pleading prevails, the rule prohibiting material variance between allegation and proof must be observed. *St. Louis Merchants' Bridge T. Co.* v. *Schuerman* (C. C. A. 8, 1916) 237 Fed. 1; cert. den. 242 U. S. 652, 61 L. Ed. 546; *Waters* v. *Guile* (C. C. A. 6, 1916) 234 Fed. 532; *Smith* v. *Thompson* (Mo. 1942) 161 S. W. (2d) 232; *Fort Worth, etc. Ry. Co.* v. *Burton* (Tex. Civ. App. 1942) 158 S. W. (2d) 601.

4. Petitioner Has No Case Anyway.

Looking at the case in the large, there were only three possibilities of negligence:

(1) negligent operation of the train as alleged;

(2) negligent failure to protect petitioner with a "blue flag";

(3) negligent failure to instruct petitioner as to the purpose and use of the blue flag rule, as held by the Florida Supreme Court's first opinion in the case (R. 259, 262).

These are the facts—all of them:

Petitioner was injured on April 30th, 1945 about 6 or 6:30 o'clock in the afternoon (R. 30) while he was "bleeding" the air from a cut of cars, known as the "Highway Cut" which had been pulled into the yard about fifteen minutes before the accident, by a locomotive which then had moved on to the Company's roundhouse leaving the cut of cars standing. His work as an "air-bleeder" consisted of turning an angle cock at the end of each car so as to release the pressure out of the air pipes of the cars; of releasing the air from the air drums by pulling a lever at the side of the car; and of uncoupling or breaking the air hose between each two cars.

He began bleeding the "Highway Cut" at its north end (R. 25), to which the engine had been coupled, worked south along the cut—which consisted of fifteen or twenty cars, each about forty feet long (R. 33)—and was disconnecting the hose between the last two, or the last second and third car, at the south end of the cut (R. 25) when the accident happened.

As he was disconnecting that hose, an engine which had coupled to the north end of the cut began pulling the cars "out", i. e., northward, "too fast" for him to get from between the cars (R. 16). He heard no whisle, or bell, and no warning of any sort was given him that the cars were about to be moved.

At the time the cut began moving, the locomotive was sixteen or eighteen car-lengths away from him (R. 25), or

around six hundred forty to seven hundred twenty feet away.

No other person was around that part of the yard at the time (R. 28).

The foregoing is the testimony, and all the testimony, of the petitioner as to the manner in which he was injured. It is not corroborated by any fact or circumstance in the record.

Petitioner's father, Moses H. Johnson, who was working in the yard at the time as a "box packer" (of the wheels' journal boxes) knew nothing of the accident; but he testified (R. 33, *et seq.*):

> "In *our* department *we* are supposed to put a blue light or a green flag—the green flag in the daytime or the blue light at night—on each end of the cut" (R. 35). There was no flag or light on the cut. The purpose of the flag or light is "for the train crew not to move it until it is properly worked, until the *car inspectors* and all get through with it" (R. 35; italics added).

Another box packer, Crockett (R. 42, *et seq.*) a witness for petitioner, was permitted to testify over our objections (R. 45) that, "In the past" there was a custom "out there as to putting up lights and flags to keep them from moving the train"—"Yes, sir, that's their custom" (R. 45). The flag "should be *red*" (R. 45, italics added). "I don't know exactly the rule, but I know that they do have blue flags and red flags" (R. 45). The flag is stuck up in the middle of the track between the rails or on the end of the train.

The car inspectors are supposed to put out the flags (R. 47). The flag should be on the "tail end", which would have been the south end of this train. (And hence, obscured by the cars from the locomotive six hundred or eight hundred feet away.)

The "Highway Cut" came in at 3:30 or 4 P. M. He and Moses Johnson were "partners", and when that cut came in he and Mose went over and looked at the boxes and journals and packed whatever was necessary. It took him and Moses Johnson about fifteen or twenty minutes to finish their work.

"The bleeder had no time to come along. . . . We don't have anything to do with the bleeder. I don't know anything about his job" (R. 52).

The foregoing is *all* the testimony upon which petitioner's verdict was based.

The essential parts of petitioner's version were vigorously contradicted by the defendant. The jury, of course, resolved the conflict against us.

But there is no conflict as to the following evidence presented by the defendant, and no contradiction of it:

There were twenty-one cars in the cut. The journal boxes were packed and inspected by oilers Crockett and Johnson, petitioner's witnesses. Those facts are shown by the original "Inspectors' Report of Incoming Trains" (R. 236), made out on the date of the accident. Crockett and Johnson proceeded with their work immediately behind the two inspectors, and had finished when the report was made out (R. 92).

The "flag" rule referred to by petitioner's witnesses Crockett and Mose Johnson (R. 35, 45) is rule 26 in the Company's printed Rule Book; and it reads (R. 130):

> "Rule 26. A blue signal displayed at one or both ends of an engine, car or train indicates that workmen are under or about it; when thus protected, it must not be coupled to or moved. *Each class* of workmen will display the blue signals and the *same workmen* are alone authorized to remove them. Other equipment must not be placed on the same track so

as to intercept the view of the blue signals without first notifying the workmen''. (Italics supplied.)

The train crew in charge of the switching movement at the time of plaintiff's injury testified that none of them saw him before he was hurt, and did not know that he was anywhere about the cars. (Miller, the conductor, R. 133; Campbell, the engineer, R. 154; the fireman, Bruton, R. 169; Bryant, the switchman, R. 199; Chambers, the yardmaster who had directed the movement and was present observing it, R. 75.)

When the cut of cars was pulled out by the engine, it came smoothly and easily. There were no brakes set on any of the cars, and the air brakes were operating only on the engine (R. 144). If there had been air on any of the cars, the pull would have been "hard", some of the wheels would have slid and that would have caused the cut to come out with somewhat of a jerking movement, of which there was none (R. 155). The engine was not a steam locomotive, but a Diesel; and the Diesel will not start suddenly because its wheels will slip and prevent it (R. 155). When the engineer was flagged down, when Johnson's injury was observed by others of the crew, he had pulled the cut about sixteen car lengths, and at that time was moving six or eight miles per hour (R. 155).

The bell on the locomotive was being sounded as the movement began (R. 155).

There is no Federal case holding that the respondent here owed petitioner any duty to look for his presence between the cars before they were moved. The holdings are precisely to the contrary, as we show in a moment. Nor was there any custom of doing so. The testimony of the conductor on this point (R. 145) is not disputed; he said:

In making a movement of that sort, "it is not customary in the yard to have anybody at the bottom of the cut [about where petitioner said he was]. We never do that. If we had to send men down to the bottom of the cut, you would never get anywhere". (R. 145).

The movement was a switching movement wholly within yard limits.

"Under such circumstances, it is not the duty of the railroad to keep a lookout for men at work in the yard, but they are expected to look out for their own safety". *Southern Ry. Co.* v. *Verelle* (C. C. A. 4, 1932) 57 F. (2d) 1008, 1011.

Gilmer v. *Yazoo & M. V. R. Co.* (C. C. A. 5, 1925) 4 F. (2d) 963, denied recovery for a yard employee's death, in part because "he was bound to know . . . that it might be expected at any time, day or night, that a car would be moved without warning of any kind".

Reading Co. v. *Haldeman* (C. C. A. 3, 1927) 20 F. (2d) 53, which states:

> "It will thus be seen that the work on which the decedent was engaged was one of peril; that the noise incident to escaping steam in such yards, the uncertain movement of engines, the fact that no system of warnings has been, or indeed could be, devised by which danger could be avoided, have made this court hold to the reasonable rule that, as said by it in Connelley *v.* Pennsylvania, 201 F. 54, 47 L. R. A. (N.S.) 867 (cited by Supreme Court in Chesapeake *v.* Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914), 'from the nature of such employment, the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law'."

And in such a movement the railroad company is not *required* to ring a bell or blow a whistle before or attending a movement of a locomotive—for the obvious reasons that everybody at work in the yard knows that it is the very place where trains of cars are "broken up", cars shifted to and from various tracks, engines constantly in movement; and therefore blowing whistles and ringing bells would only add confusion to the unavoidable complexity of the work. *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. Ed. 768, where the court said:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion."

When petitioner was injured he was 700 feet away from the locomotive; another locomotive was switching on the next adjoining track. If either had blown a whistle or rung a bell, both of them should have. If either or both had, what warning would have been conveyed to the petitioner? The yard was a busy one. There were at least 20 switch tracks in it. In the three and one-half hours petitioner had been at work he had "bled" the air from five or six cuts (R. 24).

As well a considered case on this subject as any of them is *Sumney* v. *Southern Ry. Co.* (C. C. A. 4, 1937) 89 F. (2d) 437:

> "The authorities are clear to the effect that, in the absence of rules or custom requiring it, no signal as to movement of cars need be given in the course of switching operations where, as here, there is nothing to show that those in charge of the operations know or have reason to believe that others are in positions where they will be endangered thereby.

Chesapeake & O. Ry. Co. *v.* Mihas, 280 U. S. 102, 50 S. Ct. 42, 44, 74 L. Ed. 207; Toledo, St. L. & W. R. Co. *v.* Allen, 276 U. S. 165, 48 Sup. Ct. 215, 217, 72 L. Ed. 513; Aerkfetz *v.* Humphreys, 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758; McClellan *v.* Penn. R. Co. (C. C. A. 2) 62 F. (2d) 61; Cain *v.* Fort Worth & Denver City R. Co. (C. C. A. 5th) 75 F. (2d) 103."

Also just about squarely in point is *McClellan* v. *Pennsylvania R. Co.* (C. C. A. 2, 1932) 62 F. (2d) 61. That plaintiff unsuccessfully attempted to rely upon "custom" instead, as Johnson apparently does, upon "rule". The court disposed of that contention by holding that alleged custom must amount to a "definite, uniform and known practice under certain definite and uniform conditions". Then the court said:

> "The usual prudent man rule which the law without proof sets up as the common standard would not suffice for the plaintiff in this case, for the employees of the defendant making the coupling did not know the plaintiff was in danger. *Nor were they bound to know it.* Aerkfetz *v.* Humphreys, *et al.*, 145 U. S. 418, 12 S. Ct. 833, 36 L. Ed. 758; Chesapeake & O. Ry. Co. *v.* Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. Ed. 207; Michigan Cent. R. Co. *v.* Zimmerman (C. C. A.) 24 F. (2d) 23."

There was no duty on the respondent, as defendant in the trial court, to itself see to it that petitioner was protected by a blue flag, even though the Florida Supreme Court held so in its first opinion which it recanted (R. 261).

The very language of the rule (R. 130) shows that it has no application here: "Each class of workmen," it says, "will display the blue signals and the *same* workmen are alone authorized to remove them." Johnson, having no helper, was in a "class" by himself. His witnesses, the

box packers, Crockett and Mose Johnson, were in a class by themselves. Said Crockett, "The bleeder had no time to come along . . . We [meaning him and Mose Johnson, for they were partners (R. 48)] don't have anything to do with the bleeder. I don't know anything about his job" (R. 52). The inspectors of course were in a class of their own.

It cannot be contended, because there is nothing in the evidence to support it, that maybe Johnson, after all, was in a "class" with either the box packers or the inspectors. Such a contention would be based purely on speculation, conjecture and surmise.

Nor is there any substance in the holding of the Florida Supreme Court in its first and withdrawn opinion (R. 262) that somebody failed in instructing petitioner as to the use and purpose of the blue flag rule.

First of all, there is no suggestion in the record that petitioner did not know of such use and purpose. His testimony is entirely silent in that respect. However, without contradiction of fact or circumstance, he had been working in the yard 4 months and 8 days. He had been working in the yard 108 working days. Each day was an 8-hour one. He had worked in the yard nearly 1,000 hours, i. e., 864. If he "bled" no more cuts each 8-hour day than the 5 or 6 he "bled" on the day he was hurt, he had "bled" not less than 540 cuts. By his own testimony (R. 8, 9), "Mr. Wright", the yardmaster, is the man that the plaintiff went to when he first went to work out there and is the man that told the plaintiff "what his duties were and what to do". Unless still another presumption against railroad companies in the trial of cases is to be created, that testimony means that Wright had properly instructed the plaintiff as to all phases and aspects of his duties, including the function and use of the blue flag rule; for the presumption ought to be here, as

everywhere else in the law it is, that a man charged with the performance of a duty or responsibility has fulfilled it, and the presumption ought to furnish the truth of the matter unless there is evidence that he has not. There is no other evidence on that point except that just referred to, though it is worth observing that petitioner's witnesses Johnson and Crockett either had been given instructions as to the blue flag rule and its observance, or otherwise knew about the rule's requirements.

If indeed petitioner ever had testified that he had not been instructed as to the observance of the rule, it is reasonable to assume that defendant would have sought by Mr. Wright, the Yardmaster, to prove that the petitioner had spoken truly when he testified that Mr. Wright had told him "what his duties were and what to do", and that among the other things Mr. Wright told him was the meaning and importance of the blue flag rule.

Conclusion.

We submit, therefore, that in any aspect of the petition for certiorari it should be denied and petitioner, by this Court, as he was by the Supreme Court of Florida, sent back to the Circuit Court of Duval County, Florida where he voluntarily filed this action.

Respectfully submitted,

CHARLES COOK HOWELL,
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P. O. Box 461,
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Certificate of Service.

I hereby certify that on the 16th day of September, 1949 I mailed two (2) copies of the foregoing brief to petitioner's counsel of record at his correct Post Office address.

CHARLES COOK HOWELL,
Attorney for Respondent.